

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ROSALIE FOSS,

Plaintiff,

v.

NAVIENT SOLUTIONS, INC. and  
DOES 1-10,

Defendant.

Case No.: 3:16-cv-1458-CAB(BGS)

**DISMISSAL WITHOUT PREJUDICE**

The complaint in this action was filed on April 11, 2016 alleging violations of the Telephone Consumer Protection Act (“TCPA”). On September 7, 2016, the Court issued an order to show cause why this case should not be dismissed for lack of jurisdiction. [Doc. No. 6.] On September 21, 2016, Plaintiff filed a response to the Order to Show Cause. [Doc. No. 7.]

To bring a suit in federal court a plaintiff must fulfill the Article III standing requirements. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982). Because Article III standing is constitutional, “Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” *Spokeo, Inc., v. Robins*, 136 S. Ct. 1540, 1547 (2016).

Article III standing requires that: “(1) at least one named plaintiff suffered an injury in fact, (2) the injury is fairly traceable to the challenged conduct, and (3) the injury is likely to be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotation marks and citation omitted). As the party invoking federal jurisdiction, Plaintiff bears the burden of establishing these elements. *Spokeo*, 136 S. Ct. at 1547. At the pleadings stage, this means Plaintiff must “clearly . . . allege facts demonstrating” each element of Article III standing. *Id.*

To satisfy the injury-in-fact element of Article III standing, a plaintiff must show that he/she “suffered an invasion of a legally protected interest that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Id.* at 1548 (citations omitted). A particularized injury “must affect the plaintiff in a personal and individual way.” *Id.* A concrete injury “must be ‘*de facto*’; that is, it must actually exist.” *Id.* In *Spokeo*, the Supreme Court explained that the mere existence of a statutory violation is not enough to establish a concrete injury: “Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize the person to sue to vindicate that right.” *Id.* at 1549. An allegation of a bare procedural violation, “divorced from any concrete harm” does not “satisfy the injury-in-fact requirement of Article III.” *Id.*

In her response to the order to show cause Plaintiff argues that claims brought under the TCPA are more than bare procedural violations. In support, Plaintiff relies on a number of cases that are not binding on this Court and whose reasoning it does not find persuasive. In *Krakauer v. Dish Network L.L.C.*, 168 F. Supp. 3d 843 (M.D.N.C. Aug. 5, 2016), the court held that telemarketing calls made in violation of the TCPA are more than bare procedural violations. The court explained that these types of calls “form concrete injuries because unwarranted telemarketing calls are a disruptive and annoying invasion of privacy.” Similarly, in *Booth v. Appstack, Inc.*, CASE NO. C13-1533JLR, 2016 WL 3030256, at \*5 (W.D. Wash. May 25, 2016), the court found that the time

1 wasted answering or otherwise addressing robocalls was sufficient to demonstrate a  
2 “concrete injury as elucidated in *Spokeo*.” Likewise, in *Aranda v. Caribbean Cruise*  
3 *Line, Inc.*, Case No. 12C4069, 2016 WL 4439935, at \* 5-6 (N.D. Ill. Aug. 23, 2016), the  
4 court concluded that unsolicited telemarketing calls by their nature invade the privacy and  
5 disturb the solitude of their recipients thereby creating the concrete “*de facto*” injury  
6 required to establish standing. The court in *Mey v. Got Warranty, Inc.*, Civil Action No.  
7 5:15-CV-101, 2016 WL 3645195, at \*3 (N.D.W.V. June 30, 2016), found that unwanted  
8 phone calls caused concrete harm and interpreted the TCPA “as merely liberalizing and  
9 codifying the application of [a] common law tort to a particularly invasive type of  
10 unwarranted telephone call.” Finally, Plaintiff cites to *A.D. v. Credit One Bank. N.A.*,  
11 Case No. 14 C 10106, 2016 WL 4417077, at \*7 (N.D. Ill. Aug. 19, 2016), where the  
12 court held that unsolicited phone calls are an invasion of the recipient’s privacy and  
13 constitute an intangible, concrete harm.

14 Notably, Plaintiff’s response fails to address or mention this Court’s order in  
15 *Romero v. Dept. Stores Nat’l Bank*, Case No.:15-CV-193-CAB-MDD, 2016 WL  
16 4184099 (S.D. Cal. Aug. 5, 2016). In *Romero*, plaintiff contended that defendants  
17 violated the TCPA over 290 times, once for every time defendants allegedly called her  
18 cell phone using an automated telephone dialing system (“ATDS”) after she had revoked  
19 her consent to call her cell phone. *Id.* at \*3. Plaintiff argued that she had suffered the  
20 additional injuries in fact of “invasion of privacy,” “trespass to chattels,” and “lost time,  
21 aggravation, and distress.” *Id.* at \*4. As each alleged violation of the TCPA is a separate  
22 claim, “for each call Plaintiff must establish an injury in fact as if that was the only TCPA  
23 violation alleged in the complaint.” *Id.* at \*3. This Court found that “the mere dialing of  
24 a cellular telephone number using an ATDS . . . does not cause an injury to the  
25 recipient.” *Id.* at \*6. Calls made to plaintiff’s phone that she did not answer or was  
26 unaware of were merely procedural violations that did not cause an injury in fact. *Id.* at  
27 \*3-4. Further, the Court held that even for the calls that Plaintiff heard ring or answered  
28

1 she had not offered “evidence of a concrete injury caused by the use of an ATDS, as  
2 opposed to a manually dialed call.” *Id.* at \*3.

3 The Court has not been persuaded to depart from its reasoning in *Romero*. Nothing  
4 in Plaintiff’s response addressed the Court’s concerns that the complaint only makes bare  
5 allegations of TCPA violations, but does not allege that each violation caused a concrete  
6 and particularized injury to Plaintiff. Similar to the Plaintiff in *Romero*, Plaintiff argues  
7 that the injuries she has suffered are injuries in fact sufficient to establish standing.  
8 Specifically, Plaintiff alleges that she has suffered invasion of privacy and “intrusion  
9 upon and occupation of the capacity of the consumer’s cell phone” which she asserts is  
10 analogous to the common law claim of trespass to chattels. But, “[i]nvasion of privacy  
11 and trespass to chattels are torts, not injuries in and of themselves. Injury is merely an  
12 element of these claims.” *Id.* at \*4.

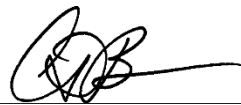
13 Moreover, neither the response nor the complaint offers any evidence of a concrete  
14 injury caused by the use of an automated telephone dialer system, as opposed to a  
15 manually dialed call for the more than one hundred fifty calls that Plaintiff did not  
16 answer. Plaintiff simply declares that it has been extremely frustrating and annoying  
17 receiving the volume of unwarranted collection calls . . . Defendant’s collection calls  
18 distract me from what I am doing at the time of the call, completely waste my time, waste  
19 my phone’s battery and prevent me from answering other legitimate calls.” [Doc. No. 7-  
20 1, ¶ 9.] For each and every one of the calls that Plaintiff heard ring but did not answer,  
21 she has not demonstrated that she suffered an injury in fact solely as a result of her  
22 telephone ringing in that particular instance. As this Court noted in *Romero*, “[w]hen  
23 someone owns a cell phone and leaves the ringer on, they necessarily expect the phone to  
24 ring occasionally. Viewing each call in isolation, whether the phone rings as a result of a  
25 call from a family member, a call from an employer, a manually dialed call from a  
26 creditor, or an ATDS dialed call from a creditor,” any frustration, annoyance, waste of  
27 time, waste of phone battery and inability to answer other calls is the same. *Romero*,  
28 2016 WL 4184099, \*4.

1 Similarly, for the calls that Plaintiff answered, the response to the order to show  
2 cause and the complaint offer no evidence of a concrete injury caused by the use of an  
3 automated telephone dialer system, as opposed to a manually dialed call. Thus “Plaintiff  
4 has not offered any evidence demonstrating that Defendants’ use of an ATDS to dial her  
5 number caused her greater” frustration, annoyance, waste of time, waste of phone battery  
6 and inability to answer other calls “than she would have suffered had the calls she  
7 answered been dialed manually, which would not have violated the TCPA.” *Id.* at \*5.

8 Without any allegations of injury caused by the statutory violations, the Court finds  
9 that Plaintiff lacks standing under Article III for her TCPA claims. Accordingly, it is  
10 hereby **ORDERED** that this action is **DISMISSED**.

11 **IT IS SO ORDERED.**

12 Dated: October 11, 2016



Hon. Cathy Ann Bencivengo  
United States District Judge